

FEDERAL CIRCUIT COURT OF AUSTRALIA

ARORA v MINISTER FOR IMMIGRATION & ANOR [2015] FCCA 2779

Catchwords:

MIGRATION – Administrative Appeals Tribunal (Migration and Refugees Division) – Skilled Residence (Class VB) visa – bogus document – whether Public Interest Criterion 4020 was enlivened – no jurisdictional error – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5, 97, 359A, 476
Migration Regulations 1994, cl.886.225, PIC4020

Cases cited:

Batra v Minister for Immigration and Citizenship [2013] FCA 274
Sharma v Minister for Immigration and Citizenship [2014] FCCA 2821
Singh v Minister for Immigration and Citizenship & Anor [2012] FMCA 145

Applicant:	SALIL ARORA
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 1469 of 2015
Judgment of:	Judge Street
Hearing date:	8 October 2015
Date of Last Submission:	8 October 2015
Delivered at:	Sydney
Delivered on:	8 October 2015

REPRESENTATION

Counsel for the Applicant: Ms A Poljak
Solicitors for the Applicant: Christopher Levingston & Associates
Counsel for the Respondents: Mr G Johnson
Solicitors for the Respondents: Sparke Helmore

ORDERS

- (1) The name of the Second Respondent be changed to the Administrative Appeals Tribunal and the requirement to lodge any further document in that regard is dispensed with.
 - (2) The Amended Application is dismissed.
 - (3) The Applicant to pay the First Respondent's costs fixed in the amount of \$5800.
- (i)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 1469 of 2015

SALIL ARORA

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application within the Court's jurisdiction under s.476 of the *Migration Act 1958* (Cth), in which the applicant seeks a Constitutional writ in respect of the decision of the Tribunal, made on 1 May 2015, affirming a decision of the delegate not to grant the applicant a Skilled Residence (Class VB) visa.
2. On 20 January 2009, the applicant completed an application in support of the visa, in which he identified undertaking a skills assessment in respect of the nominated occupation of pastry cook, which it was said had been assessed by Trades Recognition Australia, dated 8 May 2008. In the application that occupation provided a points score that was relevant to the making of the application.
3. In support of the application for a visa the applicant also provided to the Department the skills assessment by Trades Recognition Australia,

dated 8 May 2008, in relation the occupation of pastry cook, which in its reasons referred to evidence provided by the applicant satisfying Trades Recognition Australia that the applicant had performed 900 hours directly related work experience, as set out in s.12 of the Uniform Assessment Criteria. Part of the skills assessment set out an application assessment sheet that identified a positive answer in relation to the applicant having undertaken 900 hours work experience.

4. It is clear that the applicant provided to Trade Recognition Australia an employment reference letter from Axilleon Cakes in Melbourne that purported to evidence 900 hours work experience by the applicant. The delegate identified the criteria under cl.886.225 in relation to the mandatory requirements for the grant of the visa, as providing:

The applicant:

(a) satisfies public interest criteria 4001, 4002, 4003, 4004, 4010, and 4020; and

(b) if the applicant had turned 18 at the time of application – satisfies public interest criterion 4019

5. The delegate also identified the requirements of PIC4020 in Schedule 4 of the Regulations, which is as follows:

4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5-reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

(a) the application for the visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:

(a) starting 3 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(2A) The applicant satisfies the Minister as to the applicant's identity.

(2B) The Minister is satisfied that during the period:

(a) starting 10 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:

(a) compelling circumstances that affect the interests of Australia; or

(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

(5) In this clause:

" information that is false or misleading in a material particular " means information that is:

(a) false or misleading at the time it is given; and

(b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

6. The delegate referred to the definition of bogus document at the time that was then in the Regulations and picked up s.97, which in substance

was the definition found at the time of determination by the Tribunal in s.5(1) as follows:

"bogus document " , in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.

7. The delegate relevantly found:

On 20 January 2009 you lodged your application for a Skilled - (VB 886) Sponsored (Full Fee) visa .

On 21 January 2009, in support of your application for a Skilled - (VB 886) Sponsored (Full Fee) visa, you provided to an officer a skills assessment from Trades Recognition Australia (TRA) - Reference Number: TRAOS/062209744. To obtain this skills assessment, you supplied to TRA documents supporting your 900 hours work experience from Axilleon Cakes.

...

The documents you provided to TRA in support of your claimed 900 hours work experience are from Axilleon Cakes. The individual's admissions and subsequent guilty plea to the design, production and sale of work references from Axilleon Cakes.to assist GSM visa applicants to obtain positive skills assessments therefore give rise to a very strong inference that the supporting documents you provided to TRA are also fraudulent.

In my assessment, you have failed to provide sufficient evidence, including the provision of any independently verifiable third party documents, to substantiate your employment claims.

Based on the evidence and information before me, I am satisfied that the skills assessment with the reference number TRAOS/062209744 you submitted to an officer of the department on 21 January 2009 is a bogus document within the meaning of subsection 97(c) of the Act because I reasonably suspect it is a document that was obtained because of a false or misleading

statement made to TRA, whether or not made knowingly, about your claimed 900 hours work experience from Axilleon Cakes.

As there is evidence that you have given, or caused to be given, a bogus document in relation to your visa application to an officer, I find that you do not satisfy PIC 4020(1).

8. In summary, the applicant contended that Trades Recognition Australia was not an authorised assessor at the times of the skills assessment and, therefore, the document was not relevant to PIC4020(1). The Tribunal identified the purpose of PIC4020 and referred to the decision in *Batra v Minister for Immigration and Citizenship* [2013] FCA 274, and distinguished the decisions of *Sharma v Minister for Immigration and Citizenship* [2014] FCCA 2821 and *Singh v Minister for Immigration and Citizenship & Anor* [2012] FMCA 145 and relevantly held:

79. Consequently, given the case law in the Batra appeal case and Mudiyansele's case, as well as the decisions in Sharma's case and MRT Case No. 1217622, the Tribunal does not accept the representative's submission that the status of Trades Recognition Australia when it issued the applicant with a favourable skills assessment in May 2008 prevents the application of public interest criterion 4020 to him in circumstances where it is alleged that he gave a bogus document to the Minister with his visa application.

...

97. The Tribunal further observes that the question posed by subclause 4020(1) requires it to make a "no evidence" finding regarding the matters set out in this provision. As a result, even if the Tribunal accepted that the applicant did undertake some work experience as a pastry cook at Axilleon Cakes, the evidence in this case casts serious doubt upon the nature and duration of that claimed work experience and whether he actually completed the 900 hours' work experience required for a valid skills assessment to be issued by Trades Recognition Australia in 2008.

98. Accordingly, whilst the Tribunal has had regard to the applicant's responses to the Department in November 2011 and October 2012, as well as to the Tribunal in 2015, it considers that the information before it does raise serious doubts about the duration of the applicant's claimed work experience at Axilleon Cakes. Therefore, the Tribunal is satisfied that this information casts doubt on the applicant's claim that he undertook more than 1000 hours work experience at Axilleon Cakes in 2007 /08.

99. As a result, and having regard to the relevant case law, the Tribunal considers that the facts conveyed by the information before it constitute "evidence" that casts serious doubt as to whether the applicant had actually completed 900 hours' work experience at Axilleon Cakes, as required by Trades Recognition Australia in 2007/08.

100. As noted above, the skills assessment issued to the applicant was based on the evidence he had provided to Trades Recognition Australia that purportedly satisfied the UAC requirement for 900 hours directly related work experience as a pastry cook.

101. Consequently, the Tribunal finds that the information before it, taken as a whole, constitutes evidence of the applicant having provided a false or misleading statement to Trades Recognition Australia regarding the number of hours work experience he had undertaken at Axilleon Cakes in 2007/08. This information then resulted in the favourable skills assessment issued to the applicant.

102. Therefore, the Tribunal finds that there is evidence that gives rise to a reasonable suspicion that the skills assessment issued to the applicant was obtained because of a false or misleading statement and, therefore, a 'bogus document' as defined in subsection 5(1)(c) of the Act.

103. The applicant has not disputed the fact that he provided his skills assessment from Trades Recognition Australia to the Department for the purposes of his subclass 886 visa application.

...

107. In the present matter, in the Tribunal's view the evidence regarding Mr A's criminal conviction, and the fact that Mr A specifically identified the applicant as a person for whom he had signed a work reference in Ms X's name with her consent, coupled with the applicant's admission that he had paid Mr A \$250 for a work reference, is sufficient to satisfy the requirement in Trivedi's case for there to be an element of fraud or deception on the part of someone, if not the applicant.

108. The Tribunal further observes that there is ample judicial authority to the effect that an applicant's indifference to the details set out in a visa application, including where the details are provided by a third party agent rather than the applicant personally, does not mean that the applicant can avoid the application of public interest criterion 4020. 59

109. Consequently, having regard to the evidence before it and the relevant case law, given that the applicant submitted his favourable skills assessment from Trades Recognition Australia to the Department (the Minister) with his visa application, the Tribunal is not persuaded that the circumstances envisaged in Trivedi's case⁶⁰ in relation to innocent, unintended or accidental matters, apply in the present review application.

110. Therefore, the Tribunal finds that the applicant gave, or caused to be given, a 'bogus document' when the subclass 886 visa application was lodged on 20 January 2009.

Summation:

111. Consequently, for the purposes of subclause 4020(1), the Tribunal considers that the information before it constitutes evidence that the applicant gave, or caused to be given, a 'bogus document', as defined by subsection 5(1) of the Act, to the Minister or an officer when he submitted his skills assessment to the Department with his visa application.

112. As a result, the Tribunal is not satisfied that there is no evidence that the applicant has given, or caused to be given, to the Minister, or an officer of the Department, a 'bogus document' in relation to his application for a Skilled (Residence) (Class VB) visa. Accordingly, the Tribunal finds that the applicant does not meet the requirements of paragraph 4020(1)(a) and subclause 4020(1).

9. The Tribunal then turned to the issue of compassionate or compelling circumstances and noted that this was a case where the applicant had instructed the Tribunal to determine the matter on the papers, and it was in those circumstances. The Tribunal concluded

146. As a result, the Tribunal finds that the applicant does not satisfy paragraphs 4020(4)(a) and (b) and subclause 4020(4) at the time of its decision. Therefore, given its earlier finding in relation to subclause 4020(1), the Tribunal also finds that the applicant does not satisfy the requirements of public interest criterion 4020 at the time of its decision.

147. Consequently, the Tribunal finds that the applicant does not meet the requirements of subclause 886.225(a) and clause 886.225 at the time of decision and the visa application fails on this basis.

148. In order to meet the criteria for a Subclass 885 (Skilled - Independent) visa and Subclass 887 (Skilled - Regional) visa, the Tribunal observes that the applicant must meet clauses 885.224

and 887.225 respectively at the time of its decision. Clauses 885.224 and 887.225 are drafted in similar terms to clause 886.225, and they also require the applicant to meet public interest criterion 4020.

149. Accordingly, for the reasons set out above in relation to public interest criterion 4020 and clause 886.225, the Tribunal also finds that the applicant does not satisfy clauses 885.224 and 887.225 at the time of its decision. Consequently, the visa application also fails on this basis.

10. The grounds of the amended application are as follows:

1. The Second Respondent, the Migration Review Tribunal ("the tribunal") fell into jurisdictional error by finding that the Public Interest Criterion (PIC) 4020 was enlivened in the current case.

Particulars

(a) It was not open to the Tribunal to find that the Applicant in the first instance application (Visa subclass 886) was required, at the time of application to evidence a skills assessment. At the time of the making of the application [20 January 2009] the requirement for a skills assessment at cl.886.223(1) of Schedule 2 to the Migration Regulations 1994 ("the Regulations") was, by reason of the failure to appoint TRA as the relevant skills assessing authority, had the effect of rendering the regulation invalid as it was incapable of being met. That being the case, there was no requirement at the time of the making of the application for a valid skills assessment thus rendering any purported skills assessment at the time of the making of the application not material to the visa subclass.

(b) It is a requirement of PIC 4020 that the relevant information be false or misleading in a material particular [cl.4020 (5)] of the Regulations] The Tribunal erred in finding that a valid skills assessment was a requirement at the time of making the application.

2. The Second Respondent in hearing the matter de novo and in making a decision absent the Applicant's oral evidence fell into jurisdictional error by making a finding that PIC4020 (1) was enlivened by reason of the giving of false evidence which was either in the form of a bogus document or was false and misleading in a material particular by reason of the material before it.

Particulars

(a) The finding of the Tribunal that the admission of "A" (paragraphs 7 and 107 of the decision record) to the effect that A had signed the work reference for and on behalf of Ms X with her

consent, did not render that work reference a bogus document nor did the admission by the Applicant that he had paid "A" \$250 to prepare the reference. Thus the giving of the requisite consent by the person purporting to make the work reference does not constitute a false or misleading statement in a material particular. (b) The finding of the Tribunal that criterion 886.225(a) of the Regulations applied at the time of decision [30 October 2014] arises by reason of the importing into the statutory scheme on 2 April of 2011, through criterion 886.225(a), the requirement that the Applicant meet the requirements of PIC 4020 at the date of the decision. The TRA was not validly appointed until October 2011. [IMMI 11/068; SLIF2011L02011] It follows therefore that at the time of decision, the incorporation of criterion 886.225(a) had the effect of requiring the applicant not to give or cause to be given a bogus document or information that is false and misleading in a material particular; could not be made out because criterion 886.223(1) was a time of application and not a time of decision criterion. Thus the purported skills assessment was not material to any statutory requirement other than cl 886.225(a) which imported PIC 4020 into the statutory scheme.

Thus, the reception of evidence and the elucidation of facts and the making of findings in respect of those matters [the skills assessment] was misconceived by reason of it not being material to the task of the Tribunal was required to undertake in respect of the satisfaction of criterion 886.223(1) and could not inform the decision of the Tribunal to the extent asserted. The Tribunal erred by applying the wrong test.

11. I note that there was an alternative further ground that was abandoned by counsel for the applicant. I note that counsel for the applicant was, in my opinion, entirely correct in abandoning the alternative ground in relation to s.359A.
12. In relation to grounds 1 and 2, it was accepted that these were, in substance, the same grounds 1 and 2 as advanced in the matter of *Singh*. The Tribunal was correct to find that the PIC4020 criterion was enlivened and had application to the bogus document dated 8 May 2008 provided by the applicant to the Department. There is no substance in the contention that the Tribunal applied the wrong test. The unauthorised assessor status of the TRA in the letter dated 8 May 2008 was a bogus document in relation to the application for the visa. For the reasons given in the matter of *Singh*, grounds 1 and 2 fail to make out any jurisdictional error.

I certify that the preceding twelve (12) paragraphs are a true copy of the reasons for judgment of Judge Street

Associate:

Date: 19 October 2015